

Statement of Steven M. Marks
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Before
The Subcommittee on Courts, the Internet, and Intellectual Property
Committee on the Judiciary
U.S. House of Representatives
On
“Internet Streaming of Radio Broadcasts: Balancing the Interests of Sound Recording Copyright
Owners with Those of Broadcasters”

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Good morning. I am Steven Marks, General Counsel to the Recording Industry Association of America (“RIAA”). I am grateful for the opportunity to present our views concerning the use of sound recordings by broadcasters, particularly as they move into the new business of webcasting and rely upon the statutory licensing provisions of Section 114 of the Copyright Act. The provisions of Section 114 provide important protection for creators at a time when the economic incentives necessary for the creation of new musical recordings increasingly are under assault from new uses that do not incorporate protections against abuse of copying and redistribution technology. I would like to begin by thanking the Subcommittee, under the leadership of Chairman Smith and Ranking Democratic Member Berman, for its dedication to assuring that the public enjoys access to a steady stream of new creative works by providing protections in copyright law such as those contained in Section 114. However, there is a substantial danger that Congress’ efforts in this regard will be undermined by the abuse of new recording technologies not envisioned when Congress last addressed this subject. I hope this Subcommittee will consider action to ensure that the important protections it previously has written into law are not erased by the current threats faced by creators.

As you probably know, RIAA is the trade group that represents the U.S. recording industry. Its member record companies create, manufacture or distribute approximately 90% of all legitimate sound recordings produced and sold in the United States and comprise the most vibrant national music industry in the world. This morning I will begin with some background concerning the provisions of Section 114. I will then explain why the content protection provisions of Section 114 protect vital interests of RIAA member companies that make it financially possible for the music industry to keep bringing American consumers the music they enjoy, and why it may now be necessary to enhance the protective provisions of Section 114 to ensure that Americans continue to have access to creative new music.

Background

As the Committee knows well, copyright law confers upon creators a bundle of exclusive rights. These rights are intended to ensure that creators can receive a fair return from their creative investment and so are encouraged to create – and able to finance the creation of – new creative works for the benefit of the American people. These rights generally include rights of reproduction, adaptation and public distribution, performance and display. Today’s hearing primarily concerns performance rights. In the case of most kinds of copyrighted works, performance rights allow creators to be paid for all means by which works can be rendered, including to a live audience and by broadcast, satellite, cable, Internet and other transmissions.

However, American copyright law has never afforded to the creators of sound recordings the performance rights enjoyed by the owners of copyright in every other kind of work, and by recording artists and producers in many other countries. This is an historical anomaly. When Congress comprehensively revised the Copyright Act in 1909, there was little in the way of a commercial recording industry, and accordingly, the legislation did not provide any protection

for sound recordings. The first efforts to amend federal copyright law to protect sound recordings date to the 1920s. However, as the industry matured, and it increasingly became clear that creators should be compensated for the use of their recordings, proposals for extending copyright protection consistently faced opposition from broadcasters and others who benefited from the uncompensated use of recordings. Thus, it was not until 1971 that sound recordings received any federal copyright protection at all, and then it was only half copyright protection – bereft of any performance right.

In the ensuing years, the Copyright Office twice studied the absence of a performance right and unequivocally recommended that a general performance right be extended to sound recordings. Over time, the absence of a performance right became increasingly problematic in light of new digital technologies – such as digital cable and on-demand delivery technologies – that were clearly the wave of the future and held the potential to replace record sales with uncompensated performances. Eventually, record companies came to believe that this risk was so great that they should accept a severely limited performance right to equip the industry for the future. Under the leadership of members of this Subcommittee and others in Congress, input was sought from the Copyright Office and all the affected industries: record companies, musicians’ unions, broadcasters, cable music services, cable providers, business music services, music publishers and others. Through those consultations, a complex compromise was fashioned in the Digital Performance Right in Sound Recordings Act of 1995 (“DPRA”).

The key elements of that package of compromises are as follows:

- Sound recording copyright owners received a performance right, but it was severely limited: It only extended to performances by means of digital audio transmission.¹ Thus, live performances, analog transmissions, and audiovisual transmissions were not covered.

¹ 17 U.S.C. § 106(6).

- Within the scope of that limited right, there were numerous exemptions.² Broadcast transmissions, certain retransmissions of broadcasts, and certain other kinds of transmissions were all exempted.
- Most non-exempt digital audio transmissions were made subject to a compulsory license so that users were assured that they would have the ability to use recorded music at royalty rates set by the government, so long as they complied with certain content protection requirements carefully crafted to prevent licensed transmissions from displacing sales.³ Those requirements include:
 - A numerical limitation, called the “sound recording performance complement,” on the number of tracks from the same album, artist or box set that can be transmitted within a three hour period.⁴ By preventing transmission of entire albums or larger numbers of works by an artist, the complement encourages consumers to buy albums and therefore diminishes the displacement potential of licensed transmissions.
 - A prohibition on pre-announcement intended to minimize home recording by withholding the identity of the recordings to be transmitted.⁵
 - A prohibition on automatic channel switching intended to prevent evasion of the complement and otherwise prevent a licensee from complying with channel-specific requirements while offering a service with all the sales displacement potential of an interactive service.⁶
- One important kind of transmission was not made subject to the compulsory license: an interactive transmission.⁷ Creators of recordings were permitted to control interactive digital audio transmissions because they posed the greatest threat to sales.

In 1998, Congress clarified that this basic arrangement applies to Internet webcasting.

Congress also refined some of the existing conditions on the compulsory license, and added new ones, to strengthen the protection of sound recordings against activities that would undermine

² 17 U.S.C. § 114(d)(1).

³ 17 U.S.C. § 114(d)(2), (f).

⁴ 17 U.S.C. § 114(d)(2)(B)(i), (j)(13).

⁵ 17 U.S.C. § 114(d)(2)(B)(ii).

⁶ 17 U.S.C. § 114(d)(2)(A)(ii).

⁷ 17 U.S.C. § 114(d)(2)(A)(i).

sales.⁸ Of these, perhaps the most important is a requirement that transmitting entities not cause or induce copying by users, and if the technology used by a transmitting entity enables the transmitting entity to limit copying, the transmitting entity uses that technology to limit copying.⁹

Thus, the current statutory system recognizes a basic tension between the benefits and risks to the creation and dissemination of music posed by digital technologies. As the Senate Report to the DPRA observes:

new digital transmission technologies may permit consumers to enjoy performances of a broader range of higher-quality recordings than has ever before been possible. These new technologies also may lead to new systems for the electronic distribution of phonorecords with the authorization of the affected copyright owners. Such systems could increase the selection of recordings available to consumers, and make it more convenient for consumers to acquire authorized phonorecords.

However, in the absence of appropriate copyright protection in the digital environment, the creation of new sound recordings and musical works could be discouraged, ultimately denying the public some of the potential benefits of the new digital transmission technologies.”¹⁰

The current statutory system carefully balances these concerns by distinguishing various kinds of digital transmissions, and dealing with them differently. At one extreme, free, nonsubscription, over-the-air broadcasts consisting of a mix of entertainment and non-entertainment and other local public interest activities were not in 1995 thought to pose much risk to creators, even if digital broadcasting involved a higher sound quality than analog, because the passive activity of listening to broadcasts did not appear to pose a threat to distribution of

⁸ 17 U.S.C. § 114(d)(2)(C).

⁹ 17 U.S.C. § 114(d)(2)(C)(vi).

¹⁰ S. Rep. No. 104-128, at 14 (1995).

recordings.¹¹ Accordingly, broadcasts were exempted from the new performance right. At the other extreme, creators were given the strongest rights with respect to interactive services, because

Of all the new forms of digital transmission services, interactive services are most likely to have a significant impact on traditional record sales, and therefore pose the greatest threat to the livelihoods of those whose income depends upon revenues derived from traditional record sales.¹²

In between are subscription services and webcasting, which were thought to pose a risk of substitution, so that compensation to creators and content protection provisions were clearly warranted, but were not thought to pose so much of a risk that creators should have the power to withhold their content to make their own decisions about the degree of risk posed by these services.

Content Protection Is a Vital Part of the DPRA Compromise

The basic architecture of the DPRA described above and the specific content protection provisions of the DPRA protect the very core interests of the recording business. The economics of the recording industry reflect the scope of copyright protection for recordings. Because the creators of recordings enjoy exclusive rights of reproduction and distribution, they are paid for selling copies and, to a much smaller degree, for licensing reproductions and distributions. Because the creators of recordings have only an extremely limited performance right, they receive only a tiny portion of their revenues from licensing performances. That means that sales income is necessary to finance the creation of new works, and displacement of sales by uncompensated performances poses a grave threat to the industry's ability to continue to produce

¹¹ *See Id.* at 15.

¹² *Id.* at 16.

the music Americans enjoy. The limitations on the scope of the compulsory license and the specific conditions on the license were included as an integral part of the package of compromises represented by the DPRA to prevent transmissions from substituting for sales.

Now would be a terrible time to consider picking apart the DPRA compromise by weakening its content protection provisions. Anyone who has read the newspapers in the last several years has heard about the tremendous pain that piracy – particularly that caused by peer-to-peer services – has inflicted on the music industry. Sales of recorded music products have declined some 30% over the past three years. Likewise, sales of the top selling albums for each of the past three years has steadily decreased. Because the top selling albums provide the profits that make possible creation of the vast majority of recordings that do not achieve commercial success, these twin factors have deprived the public of creative new music as record companies have been forced to slash their artist rosters and support for new artists. Moreover, the revenue loss occasioned by this reduction in sales of CDs affects not only the record companies themselves, but the rest of the music industry as well. Lost sales have reduced royalties paid to artists, songwriters and music publishers, and thousands of Americans have lost their jobs due to retail store closings. For example, during the first half of 2003 alone, 600 record stores closed, probably in large part due to the pressures of piracy.

Weakening the protections provided by the DPRA by giving creators even less control over the use of their works is to invite more of the same. By contrast, these protections should be an immaterial limitation on broadcasters. It bears emphasis that the digital performance right does not apply at all to the traditional analog broadcast activities of broadcasters, or to their new digital over-the-air broadcasts. The provisions of the compulsory license apply to broadcasters only to the extent they choose to enter the new business of webcasting in search of new profit

opportunities. And even then, limitations such as the complement were “intended to encompass certain typical programming practices such as those used on broadcast radio.”¹³ In addition, should a broadcaster wish to make webcasts in excess of the complement or other limitations on the compulsory license, it is always free to ask permission. The marketplace works.

Broadcasters obtain clearance for all the other copyrighted material they transmit, and many webcasters have struck private licensing deals. Nothing in the DPRA prevents a broadcaster from seeking permission to transmit sound recordings on whatever basis the broadcaster and copyright owner might agree.

New Threats Warrant More, Not Less, Protection

Today, the vital interests the DPRA was designed to protect, and Congress’ intent that the DPRA “ensure that performing artists, record companies and others whose livelihood depends upon effective copyright protection for sound recordings, will be protected as new technologies affect the ways in which their creative works are used,”¹⁴ are in real jeopardy from risks not foreseen nine years ago when the DPRA was negotiated and enacted. At this critical juncture, attention should be given to more, rather than less, protection of those interests.

Perhaps the greatest threat the creators of recordings face today comes from recording devices and software that use the identifying information or “metadata” transmitted in digital radio and by satellite services, webcasters and others to allow users to selectively record or disaggregate programs into individual tracks to be listened to again and again apart from the original transmission program, or to be redistributed. Within the basic architecture of the DPRA, such automated recording is a threat because it blurs the distinctions between broadcasts,

¹³ S. Rep. No. 104-128, at 34 (1995).

¹⁴ *Id.* at 10.

noninteractive and interactive services – giving listeners on-demand access to recordings that have been transmitted and so giving any kind of transmission the sales displacement potential of an interactive service.

We already see this phenomenon in the case of webcasting, where software such as “Streamripper” allows users to copy all of the recordings transmitted on a webcast channel, disaggregate them, save them to substitute for purchases of legitimate downloads or CDs, and redistribute them with peer-to-peer software.¹⁵ Replay Music likewise enables users easily to record streaming music from webcasters or subscription services and saves them as individual, high-quality MP3 files that are automatically tagged with the artist and song title. The program even offers integrated CD burning. Creators have little ability to prevent webcasters from fueling the use of such software, since the compulsory license does not require webcasters to use new secure streaming technologies as and when they become available, but only to take advantage of the security features of the technologies they do use.

As broadcasters switch to digital broadcasting, we fear that we are on the verge of devastation to the industry that will dwarf the harm wrought by the peer-to-peer piracy problems of the last several years. Digital broadcasting is a whole new medium dramatically different from analog broadcasting. The FCC has tentatively permitted digital broadcasting “in the clear” – that is, without any protection for the copyrighted works being broadcast – even though the technical specifications for the approved transmission technology indicate it incorporates a sophisticated digital rights management system. Today, digital radio receivers like The Bug¹⁶

¹⁵ As Streamripper’s own website explains, using Streamripper “you can now download an entire collection of goa/trance music, an entire collection of jazz, punk rock, whatever you want.” <http://streamripper.sourceforge.net/about.php>.

¹⁶ <http://www.pure-digital.com/Releases/Release.asp?ID=212>.

have storage that permits features such as pause and rewind. Someday soon, digital receivers will have built-in hard drives, multi-channel decoding, and electronic program guide features that will permit users automatically to compile enormous collections of near CD-quality recordings from digital broadcasts, and to access whatever specific recordings they want whenever they want them.

The unrestricted copying, disaggregation and redistribution of digital transmission programs threatens to turn noninteractive services, like webcasts and broadcasts, into the equivalent of on-demand interactive services. This risk is particularly acute because the music broadcast on radio tends to be the most popular music, which fuels the economic engine of the recording industry, as well as pre-release recordings, where copying in the days before a recording is released in stores could eat substantially into sales. There would be little reason for most consumers to buy a download from a legitimate online service like Apple's iTunes store or buy a CD if they only need plug in a digital radio receiver to compile a collection of every popular recording. Indeed, such copying threatens to replace peer-to-peer services as a source of music for those who would rather steal it than pay for it. Why run the risks and endure the bother of using Kazaa if one only need plug in a digital radio receiver to obtain consistently high-quality copies of every popular recording? This kind of technology would mark an unprecedented shift in the nature of broadcasting and home recording, and upset the delicate balance that Congress and this Subcommittee have tried so hard to maintain over the years.

We are pleased that the FCC is looking at this issue right now. We hope that the Commission will do the right thing and require that the content protection features we understand are in the digital broadcast technology tentatively approved by the FCC be used to protect the livelihoods of everyone in the music industry dedicated to providing new music to American

consumers. We also hope that broadcasters will join us in embracing use of such content protection features, because it is not in their interest for users to be able to record automatically selected music they want to listen to and to strip out the advertising and other broadcast programming. However, digital broadcasting is only part of the problem, so the action we are requesting from the FCC can only be part of the solution. We hope this Subcommittee will consider adding to Section 114 of the Copyright Act similar content protection requirements for the non-broadcast transmissions covered by Section 114's compulsory license and will keep an eye on the proceedings before the FCC to ensure that the Commission acts with respect to broadcast transmissions in a manner consistent with federal copyright policy.